Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-552

WHEELING PITTSBURGH STEEL CORPORATION,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF
ENVIRONMENTAL RESOURCES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PAUL A. MANION
KERRY A. KEARNEY
ARTHUR J. GREIF
REED SMITH SHAW & McCLAY
747 Union Trust Building
Pittsburgh, PA 15219
Counsel for Petitioner,
Wheeling Pittsburgh
Steel Corporation

Financial Press Corporation, Pittsburgh

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In The

Supreme Court of the United States

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No.

WHEELING PITTSBURGH STEEL CORPORATION,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

Wheeling Pittsburgh Steel Corporation, petitioner herein, prays for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 375 A.2d 320 (1977) and is reproduced as Appendix A. The opinion of the Commonwealth Court of Pennsylvania is reported at 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975) and is reproduced as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on July 8, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED FOR REVIEW

Whether a ruling which deprives petitioner of any opportunity to be heard on its constitutional and other defenses to the validity and enforceability of the order and regulations which are the subject of this enforcement action against it violates petitioner's Fourteenth Amendment rights to due process of law?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 4 of the Pennsylvania Air Pollution Control Act provides in relevant part as follows:

> "All department orders shall be in writing, contain therein a statement of the reasons for their issuance, and be served either personally or by certified mail. Within thirty (30) days after service of any such order the person to whom the order is issued or any other person aggrieved by such order may file with the hearing board an appeal setting forth with particularity the grounds relied upon. An appeal to the hearing board of the department's order shall not act as a supersedeas: Provided, however, That upon application and for cause shown, The Hearing Board of the Commonwealth Court may issue such a supersedeas. Any person aggrieved by an adjudication of the hearing board may appeal to the Commonwealth Court."

35 Purdon's Pa. Stat. Ann. §4004(4.1)

STATEMENT OF THE CASE

In this action, filed in the Commonwealth Court of Pennsylvania, the respondent, Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter the "DER"), seeks to enforce its administrative order requiring petitioner Wheeling-Pittsburgh Steel Corporation to comply with certain regulations of the DER concerning sinter plant emissions. In its answer, petitioner challenged the validity and enforceability of the DER order and regulations on a number of grounds, several of which raised federal constitutional questions. Among others, petitioner alleged that the regulations exceed the state's police power because they are unnecessarily stringent for the protection of the public health, safety and welfare, are arbitrary and capricious, are incapable of rational enforcement and are void for vagueness.

The Commonwealth Court ruled that petitioner would not be permitted to introduce evidence relevant to these defenses in this proceeding (Appendix B), and that ruling has been affirmed by the Supreme Court of Pennsylvania (Appendix A). Petitioner seeks review of that ruling in this Court.

REASONS FOR GRANTING THE WRIT

The ruling in question deprives petitioner of any opportunity to be heard on its constitutional and other defenses to the validity and enforceability of the order and regulations which are the subject of this enforcement action against it. Petitioner respectfully submits that the ruling therefore violates its Fourteenth Amendment right to due process of law.

As pointed out in *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), early in our history this Court firmly established the principle that, at a minimum, due process requires a meaningful opportunity to be heard in one's defense. That principle has recurred again and again in the decisions of this Court for over a hundred years. See, e.g., *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914 (1876); *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215 (1897); *Goldberg v. Kelly*, 397 U.S. 254 (1970); and cases cited in *Boddie*, 401 U.S. at 377, n. 3.

There could, of course, hardly be a more fundamental defense on which a defendant should have the right to be heard than a challenge to the validity and enforceability of the order and regulations which are the very subject of the action against him. It is for this reason that the federal courts have consistently held that, except in the most unusual of circumstances, one can always challenge the validity and enforceability of an order or regulation in an enforcement action. *U.S. v. McCrillis*, 200 F.2d 884 (1st Cir. 1952); *Smith v. U.S.*, 199 F.2d 377 (1st Cir. 1952). See also: 3 Davis, *Administrative Law Treatise*, §23.07 at 320 (1958 ed.); and L. Jaffe, *Judicial Control of Administrative Action*, at 426 (1965 ed.). Yet the ruling of the courts below, if permitted to stand, would deny petitioner any opportunity to be heard on these fundamental defenses.

The courts below attempt to justify their ruling on the ground that petitioner should have raised these defenses in an appeal from the DER order which had granted it a variance from the regulations in question. That rationale is based upon a fundamental misconception of the statutory scheme of the Pennsylvania Air Pollution Control Act (hereinafter "the APCA"), the grant of variances thereunder and the nature of the DER order which granted petitioner its variance.

The APCA authorizes the adoption of regulations for the prevention, control, reduction and abatement of air pollution. 35 P.S. Purdon's Pa. Stat. Ann. §4005(1). Pursuant to that authority the regulations in question were promulgated and became effective on March 19, 1972. 2 *Pa. Bulletin* 383. However, because the regulations were technology-forcing in nature and were technologically impossible of compliance for certain industries at the time they were adopted, the APCA was amended to give the DER the power to grant variances therefrom. 35 Purdon's Pa. Stat. Ann. §4013.5. It was pursuant to this procedure that petitioner applied for and received the identical variance which it had requested from the DER.

The courts below assert that petitioner nonetheless should have appealed from the DER order which granted it that variance because the order imposed an obligation of compliance with the regulations by April 30, 1973. But having been granted the very relief which it had requested, petitioner was not aggrieved by that order and it therefore had no right to appeal therefrom at that time.[1]

Moreover, petitioner had no way of knowing at the time its variance was granted that the regulations would prove impossible of compliance after the variance had expired. Thereafter, petitioner immediately challenged the validity and enforceability of the regulations as soon as the DER

---

[1]In concluding that petitioner was aggrieved by the order which granted it the identical variance which it had requested, the courts below relied upon such Pennsylvania cases as *Com. v. Derry Twp.*, 466 Pa. 31, 351 A.2d 606 (1976); *Com. ex rel. Dunson v. Erie Ins. Exch.*, 465 Pa. 240, 348 A.2d 742 (1976); *Philadelphia v. Sam Bobman Department Stores Co.*, 189 Pa. Super. 72, 149 A.2d 518 (1959); and *Standard Lime and Refractories Co. v. DER*, 2 Pa. Cmwlth. 434, 279 A.2d 383 (1971). But in each of those cases, unlike the case at bar, the defendant had been directly, immediately and substantially aggrieved by the order in question. Here petitioner had received the very relief it had requested in the order.

attempted to enforce them against it. As the *Smith* and *McCrillis* cases point out, as a matter of constitutional due process a defendant in an enforcement action can always challenge the validity and enforceability of the administrative order or regulation in question unless there is a clear legislative intent to the contrary. And there is no such intent in the Pennsylvania Air Pollution Control Act under which even a person who has been aggrieved by an order of the DER *may*, but is not required to, appeal therefrom. 35 Purdon's Pa. Stat. Ann. §4004(4.1).

CONCLUSION

For these reasons, petitioner requests the Court to issue a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

PAUL A. MANION
KERRY A. KEARNEY
ARTHUR J. GREIF
REED SMITH SHAW & McCLAY

747 Union Trust Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner,
Wheeling Pittsburgh Steel
Corporation

APPENDIX A

Supreme Court of Pennsylvania

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES
v.
WHEELING-PITTSBURGH STEEL CORPORATION,
Appellant

No. 64
March Term, 1976

ORDER

AND NOW, this 8th day of July, 1977, it is ordered as follows:

X Order Affirmed. Case remanded to Commonwealth Court for further proceedings.

___ Order Reversed.

___ Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.

___ Order Modified as set forth in opinion filed herewith.

___ Order as set forth in opinion filed herewith.

___ Costs to be taxed as provided by Chapter 27 of the Pa. R. A. P.

___ Costs to be taxed as provided in opinion filed herewith.

BY THE COURT

/s/ SALLY MRVOS
Prothonotary

NOTE: Unless another date is hereinafter set forth, the foregoing order was entered on the docket on the date set forth above. Order entered: _____.

Supreme Court of Pennsylvania

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	**No. 64 March Term, 1976**
v.	Appeal from an Order of the Commonwealth Court at No. 529 C.D. 1975
WHEELING-PITTSBURGH STEEL CORPORATION, *Appellant*	

OPINION OF THE COURT

Filed: July 8, 1977

O'BRIEN, *J.*

This appeal arises from the December 10, 1975, pretrial order of Commonwealth Court, which precluded appellant, Wheeling-Pittsburgh Steel Corporation (Wheeling), from introducing evidence relevant to the issues of the validity of an administrative order of the Pennsylvania Department of Environmental Resources (DER) and the regulations upon which the order was predicated. The order further denied Wheeling a jury trial.

The facts surrounding this appeal are as follows. On June 9, 1972, appellant requested from appellee a variance from DER's regulations. Title 25, Pennsylvania Code, §123.13 and §123.41. Section 123.13 deals with the "Particulate Matter Emissions" and §123.41 deals with "Visible Emissions." Appellant's request concerned its steel-making operation at its sinter plant in Monessen, Pennsylvania.

On September 25, 1972, pursuant to the variance request of Wheeling, DER issued Administrative Order No.

72-565-V, "Order Granting Temporary Variance." The order provided, *inter alia*:

> "1. The granting of such a variance will not prevent or interfere with attainment or maintenance of ambient air standards within the time prescribed by the Federal Clean Air Act and Rules and Regulations promulgated thereunder, inasmuch as the variance period requested extends only to April 30, 1973.
>
> "2. The emissions from the source are likely to comply with Section 123.13 inasmuch as, at the expiration of the variance period, said emissions are not likely to exceed 0.02 grains per dry standard cubic foot.
>
> "3. The granting of the variance, as requested, is reasonable inasmuch as the intermediate dates, and the completion dates set forth in the petition and incorporated into this order, indicate that the company intends to effect the control of the source as quickly as is reasonably practicable.
>
> "NOW, THEREFORE, this 25th day of September, 1972, the Department hereby grants a variance, as requested in the petition (a copy of said petition is attached hereto and marked Exhibit "A"), and further orders that the Wheeling-Pittsburgh Steel Corporation, its successors and assigns shall:
>
> "(a) on or before April 30, 1973, complete the implementation of the control plan set forth in the aforementioned petition for a variance, which plan is hereby incorporated herein and made a part hereof;
>
> "(b) on and after April 30, 1973, operate its sintering operation located at its plant at Monessen, Westmoreland County, Pennsylvania, in such a manner as to maintain the emissions of particulate matter to within the limits specified in Sections 123.1, 123.13 and

123.41 of Chapter 123 of the Rules and Regulations of the Department of Environmental Resources; and,

"(c) submit bimonthly progress reports to the Department of Environmental Resources, commencing on October 31, 1972 and continuing thereafter until compliance with paragraph (a) of this order is achieved.

"The foregoing variance is granted on condition that paragraphs (a), (b) and (c) of the foregoing order are complied with within the time specified for compliance.

"Compliance with the foregoing order shall be obtained in a manner that will not violate the Environmental Protection Statutes and Rules and Regulations promulgated thereunder.

"Nothing contained in this order shall be construed to prevent or limit the application of the provisions of Chapter 137 of the Rules and Regulations of the Department of Environmental Resources which relates to air pollution episodes.

"Any questions in connection with this action of the Department of Environmental Resources, as well as all progress reports, should be directed to Mr. James K. Hambright, Bureau of Air Quality and Noise Control, Department of Environmental Resources, Post Office Box 2351, Harrisburg, Pennsylvania 17105.

"Sincerely yours,

"HOWARD W. CHAPMAN
"Associate Deputy Secretary for
"Air, Water and Community Protection

"Attachments

"Notice of Appeal
"Rules of Practice and Procedure
"Air Pollution Control Act as Amended
"Rules & Regulations of the Department of Environmental Resources
"Exhibit "A" - Petition for Variance"

The above order granted Wheeling a variance from the enforcement of DER regulations concerning particulate and visible emission from its Monessen plant until April 30, 1973. Thereafter the Monessen plant would be required to comply with all DER regulations pertaining to particulate and visible emissions. Wheeling did not appeal the September 25, 1972 variance order to the Environmental Hearing Board.[1]

On April 15, 1975, DER filed a "Petition for Enforcement of Administrative Order" in the Commonwealth Court. The above petition sought compliance with the administrative order of September 25, 1972.

Wheeling filed an answer and new matter, which alleged that the DER regulations were invalid and unenforceable. Further, Wheeling sought a declaratory judgment concerning the validity of the regulations and also demanded a jury trial.

The Commonwealth Court, per President Judge Bowman, ordered the parties to brief the following issues:

"(a) May defendant in this proceedings attack DER Regulations 123.13 and 123.41 as invalid and unenforceable;

[1]See §6 of the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4006, and the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, 71 P.S. §510, et seq., which provide for an appeal to the Environmental Hearing Board from DER orders. The procedures for perfecting an appeal are set forth in Chapter 21 of DER's rules and regulations, 25 Pa. Code §21.1, et seq. and governed by the Administrative Agency Law, 71 P.S. §1710.1, et seq.

"(b) May defendant in this proceedings attack the DER order of September 25, 1972 (Order No. 72-565V) as invalid and unenforceable;

"(c) Is defendant, as a matter of law, entitled to a jury trial in this proceedings (i) by reason of the nature of the proceedings itself, or (ii) by reason of defendant invoking declaratory judgment relief in its answer to the petition for enforcement."

On December 10, 1975, Commonwealth Court denied Wheeling the right to introduce evidence concerning the issues of the *validity* of the September 25, 1972 variance, and of the regulations themselves; in addition, Commonwealth Court denied Wheeling a right to a jury trial.

On December 29, 1975, Wheeling filed an appeal to this Court from the December 10 order of Commonwealth Court. On December 30, 1975, Wheeling filed a petition with Commonwealth Court seeking a certification that the issues involved controlling questions of law and that a prompt determination of these issues would materially advance the disposition of the instant action. On January 7, 1976, the Commonwealth Court certified its order to this Court as involving controlling questions of law.

On January 28, 1976, DER filed a motion to quash the appeal. DER alleged that the December 10 order was not "final" and no appeal of right existed. DER further alleged that the issues involved were not "controlling" and, therefore, there was an improper certification by Commonwealth Court. DER also alleged that if the order was *not* a "final" order, Wheeling had not filed a petition for allowance of appeal with this Court. On February 4, 1976, Wheeling filed an answer to the motion to quash. On February 27, 1976, this Court directed that the motion to quash be heard at the time of argument.

I. MOTION TO QUASH

A. APPEALABILITY OF THE ORDER PRECLUDING ATTACK ON THE VALIDITY OF THE ADMINISTRATIVE ORDER AND DER REGULATIONS.

DER argues that the December 10 order of Commonwealth Court is not a *final* order of that court and, therefore, Wheeling does not have a right of direct appeal to this Court. We do not agree. Section 203 of the Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, No. 233, Art. II, §203, provides:

"... Appeals from the Commonwealth Court

"The Supreme Court shall have exclusive jurisdiction of appeals from all final orders of the Commonwealth Court entered in any matter which was originally commenced in said court and which does not constitute an appeal from another court, an administrative agency or a justice of the peace. Any final order of the Commonwealth Court entered in any appeal from a decision of the Board of Finance and Revenue shall be appealable to the Supreme Court, as of right, under this section."

The basis of this litigation is a petition to enforce an administrative order originally filed in Commonwealth Court. The gravamen of argument is whether the order of Commonwealth Court, limiting Wheeling's right to introduce evidence as to the validity of the variance order and the regulations, constitutes a final order for purposes of appellate review.

In *Posternack v. Am. Cas. Co. of Reading*, 421 Pa. 21, 23-24, 218 A.2d 350 (1966), this court determined that a pretrial order denying a party leave to amend an answer so as to assert a new affirmative defense constituted a "final"

order for purposes of appeal. In *Posternack*, this Court, per Mr. Justice (now Chief Justice) Eagen, stated:

> "... The order is not interlocutory, and the motion to quash will be overruled. The new defense proposed is affirmative in nature and must be pleaded, otherwise it is waived. See, Pa.R.C.P. 1030, 1032, and Lang v. Recht, 171 Pa. Superior Ct. 605, 91 A.2d 313 (1952). The order involved effectively precludes proof at trial of what might possibly be a complete defense to the cause sued upon. As to this defense, at least, the order appealed from puts the defendant 'out of court'. It is, therefore, an appealable order." See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) and Bell v. Benefic. Consumer Co., 465 Pa. 225, 348 A.2d 734 (1975).

In the instant case, the order of Commonwealth Court precluded Wheeling from presenting its "affirmative defenses" concerning the validity of the September 25, 1972 order or of DER air pollution regulations.

The refusal to allow evidence of a "possibly" meritous defense effectively puts Wheeling out of court and, therefore, the order is "final" for appeal purposes.

B. APPEALABILITY OF THE ORDER CONCERNING THE RIGHT TO TRIAL BY JURY.

DER next argues that the order denying Wheeling the right to trial by jury is not a final order. We agree. In *T.C.R. Realty, Inc. v. Cox*, Pa. , A.2d (filed April 28, 1977), this court defined a "final order" as follows:

> "... In ascertaining what is a 'final order,' we have looked beyond the technical effect of the adjudication to its practical ramifications. Bell v. Benefic. Consumer Discount Company, 465 Pa. 225, 348 A.2d 734 (1975). We have variously defined a final order as one which ends the litigation, or alternatively disposes of the entire case. Piltzer v. Independence F.S. & L. Assn., 456 Pa. 402, 319 A.2d 677 (1974); James Banda, Inc. v. Va. Manor Apts., Inc., 451 Pa. 408 303 A.2d 925 (1973). Conversely phrased, an order is interlocutory and not final unless it effectively puts the litigant 'out of court.' Ventura v. Skylark Motel, Inc., 431 Pa. 459, 463, 246 A.2d 353, 355 (1968)."

In the instant case, the denial of the right to trial by jury does not put the litigant "out of court," and therefore the order is not final for appeal purposes.

Wheeling, in rebuttal, argues that if the order concerning the right to trial by jury is not a "final order" then this court should accept the certification of Commonwealth Court that the issue presents a "controlling issue of law." We do not reach the merits of this argument because of Wheeling-Pittsburgh's failure to comply with §501(b) of the Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, No. 233, art. V, §501, 17 P.S. §211.501.

Section 501(b) provides:

> "(b) Discretionary Allowance of Appeals. - When a court or administrative agency, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such order. A petition for an allowance of an appeal under this subsection shall not stay the proceedings before the lower court or administrative agency, unless the lower court or agency or the appellate court or a judge thereof shall so order."

Wheeling did not file a petition for allowance of appeal in this Court after the certification by the Commonwealth Court. Pa. R. A. P. 1102, however, permits this Court to treat an "improvidently taken" appeal under Pa. R. A. P. 1101 as a petition for allowance of appeal. Treating the instant appeal, concerning the right to trial jury, as a petition for allowance of appeal, such petition is denied.[2]

II. MERITS OF THE APPEAL

Appellant argues that Commonwealth Court erred in prohibiting an attack on the validity of the September 25, 1972, order and DER regulations. We do not agree. On December 10, 1975, Commonwealth Court determined that "Wheeling . . . *shall not have the right to introduce evidence relevant to the issues of the validity of the order in question or the DER regulations upon which it was predicated.* . . ."

Wheeling did not appeal the administrative order of September 25, 1972. This order granted a variance to Wheeling until April 30, 1973, and further required

[2] "Rule 1101(a) Scope of rule. This rule applies to any appeal to the Supreme Court from an order of the Commonwealth Court entered in:

(1) Any matter which was originally commenced in the Commonwealth Court and which does not constitute an appeal from another court, an administrative agency or a district justice of the peace.

(2) Any appeal from a decision of the Board of Finance and Revenue."

"Rule 1102. Improvident Appeals. If an appeal is improvidently taken to the Supreme Court under Rule 1101 (appeals as of right from the Commonwealth Court) in a case where the proper mode of review is by petition for allowance of appeal under this chapter, this alone shall not be a ground for dismissal, but the papers whereon the appeal was taken shall be regarded and acted on as a petition for allowance of appeal and as if duly filed at the time the appeal was taken.

Note: Based on Section 204(b) of the Appellate Court Jurisdiction Act of 1970 (17 P.S.§211.204(b)) and makes no change in substance. In a similar fashion, any motion to quash the appeal would be regarded as a brief in opposition to the petition under Rule 1116 (brief in opposition to petition)."

compliance after April 30 with the particulate matter and visible emission regulation.[3]

In *Commonwealth v. Derry Tp.*, 466 Pa. 31, 351 A.2d 606, 610 (1976), this court, in considering a similar failure to use statutory appeal procedures precluding collateral attack on the validity of the questioned order and underlying regulations, noted:

> ". . . No appeal was taken by Derry to the Environmental Hearing Board. The failure to appeal made that order *final and foreclosed any attack on its content or validity in the enforcement proceeding.*" (Emphasis added.)

In *Com. ex rel. Dunson v. Erie Ins. Exch.*, 465 Pa. 240, 245, 348 A.2d 742 (1976), we stated:

> "Moreover, it is well settled that 'where statutory remedies are provided, the procedure prescribed by the statute must be strictly pursued, to the exclusion of other methods of redress [cites omitted]. This is particularly true of *special statutory appeals from the action of administrative bodies*. White et al. v. Old York Road Club et al., 318 Pa. 346, 178 A.3; Taylor v. Moore, 303 Pa. 469, 154 A. 799; Ermine v. Frankel et al., 322 Pa. 70, 185 A. 269.' [Emphasis supplied.] Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, 332 Pa. 15, 23-24, 1 A.2d 775, 780 (1938). Cf. Pennsylvania Life Insurance Company v. Pennsylvania National Life Insurance Company [417 Pa. 168, 208 A.2d 780 (1965)]. It follows that the Exchange, having failed to appeal from the Commission's adjudication and order of April 14, 1972, is now precluded from contesting the merits of the Commission's decision in subsequent enforcement proceedings."

[3] The record is clear that Wheeling was advised of its appeal rights but chose not to exercise those rights. See also Footnote 1, *supra*.

In the instant case, Wheeling was notified of its right to appeal the September 25, 1972 order. No appeal was taken; therefore, Wheeling is precluded from attacking the validity or content of either the order of the underlying regulations in the instant enforcement proceeding.

The order of the Commonwealth Court is affirmed, and the case remanded to that court for further proceedings. The motion to quash is granted in part and denied in part.

Former Chief Justice Jones took no part in the consideration or decision of this case.

Mr. Justice Nix took no part in the consideration or decision of this case.

Mr. Justice Pomeroy filed a concurring and dissenting opinion.

Supreme Court of Pennsylvania

WESTERN DISTRICT

COMMONWEALTH OF
PENNSYLVANIA, DEPART-
MENT OF ENVIRONMENTAL
RESOURCES

v.

WHEELING-PITTSBURGH
STEEL CORPORATION,
Appellant

No. 64
March Term, 1976

Appeal from an
Order of the
Commonwealth Court
at No. 529 C.D. 1975

CONCURRING AND DISSENTING OPINION

FILED: July 8, 1977

POMEROY, J.,

The order of the Commonwealth Court dated December 10, 1975 prohibits appellant Wheeling from introducing at trial evidence relative to the validity of the September 25, 1972 order of the DER and regulations in support thereof; it also denies Wheeling's request for a jury trial. Had the order been directed only to the latter point, certainly the correct disposition of an appeal therefrom would be to quash as interlocutory. As it is, however, it seems to me that the Court is being more technical than practical in isolating the jury trial portion of the order and quashing it. All agree that the principal part of the order of the Commonwealth Court, that which denies Wheeling the opportunity to present evidence

relevant to a complete defense, is a final order and hence properly before us. *See, e.g., Posternack v. American Casualty Co. of Reading*, 421 Pa. 21, 218 A.2d 350 (1966). Because of this I can see no jurisprudential purpose to be served by our delaying a decision on the jury trail question; we are still obliged now to entertain the appeal from that portion of the order below which is final, and a decision now on the jury issue might avoid a later appeal and a duplicative trial proceeding.*

By way of analogy, the same considerations of judicial economy and convenience which impel federal courts to entertain jurisdiction over a "pendent" state cause of action, of which a federal court would not otherwise have subject matter jurisdiction, suggest that the more prudent approach in the case at bar is for the Court to hear the appeal in its entirety. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 16 L.Ed.2d 218 (1966).

For the reasons above indicated, I dissent from the Court's partial grant of appellee's motion to quash. In all other respects, I join in the opinion of Mr. Justice O'BRIEN.

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*There may be cases where the issue involved in the "final" portion of an order appealed from is so lacking in substance as to be frivolous. Where this is so, I believe an appellate court should decline to exercise its discretion to decide the non-final issues, lest it lend encouragement to the use of the appealable aspect of the order as a mere vehicle for having interlocutory claims heard on appeal. Cf. *Abney v. United States*, U.S. , L.Ed.2d , 21 Cr.L. 3082 (decided June 9, 1977).

IN THE

Supreme Court of Pennsylvania

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Petitioner

v.

WHEELING-PITTSBURGH STEEL CORPORATION,
Respondent

NO. 529
C. D. 1975

Before: HONORABLE JAMES S. BOWMAN,
President Judge
HONORABLE JAMES C. CRUMLISH, JR.,
Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge

Submitted on Briefs

OPINION BY PRESIDENT JUDGE BOWMAN

Filed December 10, 1975

This matter is before us on a petition for enforcement of an administrative order brought by Department of Environmental Resources (DER).

In June 1972, respondent, Wheeling-Pittsburgh Steel Corporation, applied for a variance from minimum standards relating to particulate matter emissions into the

atmosphere as established by DER regulations, 25 Pa. Code §§123.13,123.41. The variance sought an extension until April 30, 1973, of the time for compliance with the standards set in the aforementioned regulations as applied to respondent's sintering plant in Monessen, Westmoreland County.

As a result of the variance request, DER issued an order on September 25, 1972, granting respondent a variance from the required standards until April 30, 1973. Respondent did not appeal this order.

On April 15, 1975, DER initiated enforcement proceedings in this Court pursuant to the Air Pollution Control Act, Act of January 8, 1960, P. L. (1959) 2119, *as amended*, 35 P. S. §4010, alleging that respondent had not complied with the order.

Respondent filed an answer containing new matter to the DER petition, which new matter raises several legal issues requiring resolution prior to evidentiary hearings on the merits of the petition. Those issues as framed by our Order of July 1, 1975, follow:

(a) May defendant (respondent herein) in this proceedings attack DER Regulations 123.13 and 123.41 as invalid and unenforceable;

(b) May defendant in this proceedings attack the DER order of September 25, 1972, as invalid and unenforceable;

(c) Is defendant, as a matter of law, entitled to a jury trial in this proceedings (i) by reason of the nature of the proceedings itself, or (ii) by reason of defendant invoking declaratory judgment relief in its answer to the petition for enforcement.

As to the issues of whether respondent can here attack DER Regulations 123.13 and 123.41 or its order of September 25, 1972, respondent has dealt with both issues in

a single argument, and DER has used similar rationale and authority in supporting its position on these two questions. In view of the parties' treatment of these two issues, we will dispose of them together.

Respondent has cited the case of *Department of Environmental Resources v. Pennsylvania Power Company*, 12 Pa. Commonwealth Ct. 212, 316 A.2d 96 (1974), *aff'd*, Pa. , 337 A.2d 823 (1975), which recognized impossibility of compliance as a defense in a contempt proceedings resulting from an unappealed DER order. At this point, however, we are concerned only with the validity of the order and regulations involved, not compliance. Other language in our opinion in that case is most appropriate, however, to the issue at hand:

> "A review of that procedure causes us to be very critical of the failure of PPC to contest the possibility of performance by way of an appeal from any of the DER orders.... The failure to take the administrative procedural protections available to a citizen from an order of a regulatory agency is not to be condoned." *Department of Environmental Resources v. Pennsylvania Power Company, supra*, 12, Pa. Commonwealth Ct. at 221, 316 A.2d at 101.

Respondent also stresses in its argument that it was not "aggrieved" by the order of September 25, 1972, because at that time it did not believe compliance would present any difficulty; therefore, respondent contends that no reason for an appeal was then indicated.

We disagree. As a result of the DER order of September 25, 1972, respondent was "aggrieved" within the meaning of the Act, 35 P. S. §4004(4.1). A party is "aggrieved" when there has been an "imposition upon a party of a burden or obligation". *Black's Law Dictionary* 87 (rev. 4th ed. 1968). Here, respondent had an obligation to comply with DER's

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regulations by April, 1973, and to do so, obviously placed a burden upon respondent, which arose as of September 25, 1972.

Respondent further argues that since the Act employs the words "may appeal", it is not mandatory to follow that procedure. We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise, would postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law. This principle was expressed in *Philadelphia v. Sam Bobman Department Store Company*, 189 Pa. Superior Ct. 72, 78, 149 A.2d 518, 521 (1959), in which Judge Woodside stated:

> "It is settled both under common law and statute that where an act creates a right or liability or imposes a duty and prescribes a particular remedy for its enforcement such remedy is exclusive and must be strictly pursued. This means that one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy.
>
> . . . .
>
> "... This is particularly true of special statutory appeals from the action of administrative bodies." (Citations omitted.)

Similarly, in *St. Joe Minerals Corporaiton v. Goddard*, 14 Pa. Commonwealth Ct. 624, 324 A.2d 800 (1974), in the context of the availability of equity jurisdiction to attack an administrative order, we found the right of appeal by the person against whom a DER order was issued constituted an adequate remedy at law, thus echoing the long standing judicial view that administrative resolution of technical

issues followed by Environmental Hearing Board review and judicial review thereafter is the preferred and proper procedure. Here, such preferred procedure would likewise be frustrated.

In *Standard Lime and Refractories Company v. Department of Environmental Resources*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971), a case involving the same appeal provisions as applicable here, we held that a party who had not timely appealed a compliance order could, nevertheless, seek a hearing on the issue of compliance, but could not at such hearing question the validity of the abatement order; again denying the right to collaterally attack an order from which no appeal had been taken.

Cases involving other administrative agencies of this Commonwealth have long espoused this policy. *Commonwealth v. Lentz*, 353 Pa. 98, 44 A.2d 291 (1945); *Milk Maid Dairy Products, Inc. v. Pennsylvania Milk Control Commission*, 190 Pa. Superior Ct. 410, 154 A.2d 274 (1959).[1]

We conclude that respondent in this proceedings has no right to attack the DER order in question nor the validity of the regulations upon which it was predicated.

The question of respondent's right to trial by jury in this enforcement proceedings necessarily emanates from Article I, Section 6, of the Pennsylvania Constitution, which provides:

> "Trial by jury shall be as heretofore, and the right thereof remain inviolate."

Our Supreme Court long has held that this language exists exclusively for the purpose of preserving jury trials as

[1] *Also see Erie Human Relations Commission v. Erie Insurance Exchange*, 12 Pa. Commonwealth Ct. 267, 315 A.2d 663 (1974), recently affirmed by the Supreme Court of Pennsylvania (No. 27 March Term, 1975, opinion filed November 26, 1975).

provided by common law.[2] *Van Swartow v. The Commonwealth*, 24 Pa. 131 (1854). It was not intended that the Constitution extend common law jury trial. *Schwab v. Miller*, 302 Pa. 507, 153 A. 731 (1931).

In an administrative matter, the dismissal of a teacher, the Supreme Court refused a demand for a jury trial based on the proposition that no right to jury trial existed prior to the Constitution, so none existed when the relevant statute did not so provide. *Watson Appeal*, 377 Pa. 495, 105 A.2d 576 (1954), *cert. denied*, 348 U.S. 879 (1954), *rehearing denied*, 348 U.S. 922 (1955). The Superior Court utilized similar reasoning in *Pennsylvania Public Utility Commission v. W. J. Dillner Transfer Company*, 191 Pa. Superior Ct. 136, 155 A.2d 429 (1959), involving a cease and desist order. Even where a civil penalty was involved, the court reasoned that since the matters entrusted to the Public Utility Commission were nonexistent at the adoption of the Constitution, no right to jury trial ever existed which the Constitution could preserve. Such is the situation in this present case.

In short, we hold, consistent with earlier Pennsylvania decisions, that the constitutional right to a jury trial does not extend to respondent in this proceedings, which are wholly a creature of recent statutory law.

Nor do we believe that respondent creates in its favor a right to a jury trial simply because it seeks declaratory relief in its answer to DER's petition for enforcement. To allow a respondent to alter the essential nature of the proceedings and thereby obtain a jury trial is illogical and would create an anomalous situation detrimental to the orderly operation of adminstrative law.

Furthermore, the Uniform Declaratory Judgments Act, Act of June 18, 1923, P. L. 840, *as amended*, 12 P. S. §836,

[2]Article IX, Section 6, of the Constitution of 1838 contained identical language.

forecloses its application in whole or in part to these proceedings. That statute provides:

> "Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy must be followed...."

The Act with which we are here concerned provides a clear specific form of remedy for those affected by DER orders or regulations. *See Friestad v. Travelers Indemnity Company*, 452 Pa. 417, 306 A.2d 295 (1973), and this Court's refusal to allow declaratory relief to be the vehicle for bypassing administrative procedures in *Gold v. Department of Public Instruction*, 16 Pa. Commonwealth Ct. 247, 328 A.2d 559 (1974). Respondent is not entitled to a trial by jury in this proceedings.

ORDER

Now, December 10, 1975, in further proceedings upon the Commonwealth's petition for enforcement of its order of September 25, 1972, respondent shall not have the right to introduce evidence relevant to the issues of the validity of the order in question or the DER regulations upon which it was predicated; and respondent is denied a jury trial in this proceedings.

/s/ JAMES S. BOWMAN
James S. Bowman, *President Judge*

CERTIFICATE OF SERVICE

I, PAUL A. MANION, in accordance with Rule 33(1) of the Rules of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari to the Supreme Court of Pennsylvania on all parties required to be served by mailing three copies thereto to Thomas M. Burke, Esquire, Assistant Attorney General, Department of Environmental Resources, 1200 Kossman Building, 100 Forbes Avenue, Pittsburgh, Pennsylvania 15222, Attorney for Respondent, by first class mail, postage prepaid, this 5th day of October, 1977.

/s/ PAUL A. MANION

Supreme Court, U.S.
FILED
NOV 3 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1977
No. 77-552

WHEELING-PITTSBURGH STEEL CORPORATION,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

THOMAS M. BURKE,
Assistant Attorney General
Commonwealth of Pennsylvania, Department of Environmental Resources.

1200 Kossman Building
Forbes at Stanwix Street
Pittsburgh, Pennsylvania 15222

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

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COUNTER-STATEMENT OF THE CASE

On June 9, 1972, Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pittsburgh"), the petitioner herein, requested from the Pennsylvania Department of Environmental Resources ("DER"), by petition, a variance from the particulate matter emission regulations applicable to its Sinter Plant in Monessen, Westmoreland County, Pennsylvania. The specified regulations (25 Pa. Code §§123.13 and 123.41), became applicable to Wheeling-Pittsburgh on January 27, 1972, pursuant to the Pennsylvania Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 et seq.

Acting on the petition, the DER, on September 25, 1972, issued an order to Wheeling-Pittsburgh, Order No. 72-565-V, which granted Wheeling-Pittsburgh a variance from the Pennsylvania Air Pollution Control Act, supra, until April 30, 1973 and *mandated* that, on and after April 30, 1973, Wheeling-Pittsburgh maintain the emissions of particulate matter from the Sinter Plant within the limits specified by DER Regulations §§123.13 and 123.41. In this order, Wheeling-Pittsburgh was notified of its right to file an appeal from the order to the Pennsylvania Environmental Hearing Board. Wheeling-Pittsburgh did not choose to appeal from the order. A petition to enforce the Order of September 25, 1972 was filed by DER in Pennsylvania Commonwealth Court on April 15, 1975, almost two years after the expiration of the variance.

Wheeling-Pittsburgh answered the petition to enforce the September 25, 1972 Order by challenging the validity of the order and the regulations on which it was predicated. The Commonwealth Court issued an opinion and pre-trial order holding that since Wheeling- Pittsburgh did not seek judicial review of the order in the statutorily designated appeal forum, it was precluded from challenging the order in the subsequent enforcing proceeding. The Commonwealth ruling has been affirmed by the Supreme Court of Pennsylvania. It is from this ruling on exhaustion of statutory remedies that Petitioner seeks review.

REASONS FOR DENYING THE WRIT

I. Petitioner is precluded from invoking the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3) as Petitioner has failed to claim a deprivation of its Fourteenth Amendment rights to due process of law at any time during the proceedings in the state courts of Pennsylvania.

This is an uncomplicated case which presents no federal questions. It involves the interpretation of Pennsylvania law on exhaustion of administrative remedies. Pennsylvania Courts have consistently held that the common law and the Act of March 21, 1806, P.L. 558, 46 P.S. 156[1] require that one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy. Wheeling-Pittsburgh argued to the Pennsylvania courts that the rule of exhaustion of administrative remedies should not apply unless a clear legislative intent of its application was present in the underlying statute.[2] The Pennsylvania Courts

[1] The Act of March 21, 1806, P.L. 558, 46 P.S. 156 provides that in all cases where a remedy is provided, or a duty enjoined, or anything directed to be done by any act or acts of assembly of the Commonwealth, the directions of the said acts shall be strictly pursued.

[2] See p. 12 of W-P's brief before the Pennsylvania Supreme Court where the argument is summarily stated: "A

disagreed, reasoning that to allow a collateral challenge to an administrative determination would allow a litigant to bypass administrative agencies and go directly to the judiciary to resolve problems, thereby subverting the quasi-judicial nature of the Commonwealth's agency system. Wheeling-Pittsburgh never raised at any prior point in the proceedings the argument that the application of the rule of exhaustion of administrative remedies as applied in this case deprives it of its Fourteenth Amendment rights to due process of law. (See Petitioner's brief to the Pa. Supreme Court, copy of which is attached as Appendix A.)

Since Wheeling-Pittsburgh's due process claim appears for the first time in its petition to this Court for a writ of certiorari, this Court lacks jurisdiction to review this belatedly asserted claim. *Whitney v. California,* 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927); *Bolln v. Nebraska,* 176 U.S. 83, 20 S.Ct. 287, 44 L.Ed. 377 (1900); *Armstrong v. Treasurer of Athens County,* 41 U.S. 281, 10 L.Ed. 965 (1842); *Howard v. Fleming,* 191 U.S. 126, 48 L.Ed. 121 (1903), 24 S.Ct. 49; *Winona Land v. Minnesota,* 159 U.S. 540, 16 S.Ct. 88, 40 L.Ed. 252 (1895); *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.,* 252 U.S. 341, 40 S.Ct. 330, 64 L.Ed. 601 (1920).

In *Bolln v. Nebraska,* supra, an objection that the defendant was denied due process of law in being re-

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defendant can challenge the validity of an administrative order or regulation in an enforcement proceeding unless there is a clear legislative intent to the contrary."

fused a jury trial upon a plea in abatement was not raised until after the cause had been decided by the Supreme Court of Nebraska. Accordingly, this Court refused to consider those constitutional immunities not properly set up below nor appearing in the opinion presented for review by writ of error. The controlling principle was unequivocally articulated by the *Bolln* Court, supra, at 91:

> "We have repeatedly decided that an appeal to the jurisdiction of this Court must not be a mere afterthought, and that if any right, privilege, or immunity is asserted under the Constitution or laws of the United States it must be specifically set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained."

Similarly in *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.,* 252 U.S. 341 (1920), a claim of invalidity under the state constitution was specifically urged and passed upon adversely to the petitioner in the state Supreme Court, but no reference was made in that connection to the Fourteenth Amendment to the Federal Constitution. Justice Brandeis aptly noted:

> "If a general statement that the ruling of the state court was against the Fourteenth Amendment were a sufficient claim of right under the Constitution to give this court jurisdiction [citation omitted], still the basis for a review by this court is wholly lacking here. For the Fourteenth Amendment was mentioned only in the trial court. In the Supreme Court of the state no

> mention was made of it in the assignment of errors; nor was it, so far as appears by the record, otherwise presented to or passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of errors filed here, but obviously that was too late. Chicago, Indiana and Louisville Ry. Co. v. McGuire, 196 U.S. 128, 132." *Hiawassee River*, supra, at 344.

In view of this critical flaw in the alleged jurisdiction of the U. S. Supreme Court therein, the *Hiawassee* Court refused to make any further inquiry into the substance of the claim that petitioner had been deprived of due process.

This rule continues to be universally and strictly applied by the Court. *Monks v. New Jersey*, 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed. 2d 54 (1970); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed. 2d 572 (1969); *Pickering v. Board of Education of Township High School District 205, Will County, Ill.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968).

Consistently with the prior constructions of the requirements of 28 U.S.C. §1257 (3) mandates dismissal of the present writ for want of jurisdiction.

II. There are no special or important reasons for granting a writ of certiorari in this case as it concerns only a question of interpretation of the Pennsylvania law on exhaustion of administrative remedies.

Wheeling-Pittsburgh's petition for writ of certiorari does not comport with Rule 19 of the Rules of the United States Supreme Court as it does not set forth any special or important reasons for granting a writ. Rather, Wheeling-Pittsburgh is petitioning this Court to review a decision of the Pennsylvania Supreme Court applying the well-established rules on exhaustion of administrative remedies and finality of a determination.

A. The Pennsylvania Supreme Court Decision Is in Accord With Precedent Case Law of the Pennsylvania and Federal Courts

The Pennsylvania Commonwealth and Supreme Courts held that inasmuch as Section 4 of the Pennsylvania Air Pollution Control Act,[3] supra, and Section

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[3] Section 4 of the Air Pollution Control Act provides in relevant part as follows:

> "All department orders shall be in writing, contain therein a statement of the reasons for their issuance, and be served either personally or by certified mail. Within thirty (30) days after service of any such order the person to whom the order is issued or any other person aggrieved by such order may file with the hearing board an appeal setting forth with particularity the grounds relied upon. An appeal to the hearing board of the department's order shall not act as a supersedeas:

1921-A of the Administrative Code of 1929, as amended, December 3, 1970, P.L. 834, 71 P.S. 510-21A,[4] provide a clear, specific, and exclusive remedy for those affected by DER orders, i.e., appeal to the Environmental Hearing Board Wheeling-Pittsburgh's failure to pursue that remedy forecloses a collateral attack on the order in the subsequent enforcement proceeding.

The decision is in accord with scores of Pennsylvania decisions which restate and uniformly apply this fundamental principle.

Provided, however, That upon application and for cause shown, the hearing board of the Commonwealth Court may issue such a supersedeas. Any person aggrieved by an adjudication of the hearing board may appeal to the Commonwealth Court."

[4] Section 1921-A provides in relevant part as follows:

"(a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the 'Administrative Agency Law,' on any order, permit, license or decision of the Department of Environmental Resources.

. . .

(c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified."

In *Commonwealth v. Lenz*, 353 Pa. 98, 44 A.2d 291 (1945), the Pennsylvania Supreme Court held that one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy.

In *Commonwealth v. Derry Township*, 466 Pa. 31, 351 A.2d 606 (1976), the Pennsylvania Supreme Court held that a party who failed to appeal a DER order is foreclosed from attack on the validity of the order in a subsequent enforcement proceeding.

In *Erie Human Relations Commission v. Erie Insurance Exchange*, 465 Pa. 240, 348 A.2d 742 (1975), the Defendant failed to appeal a Human Relations Commission order and therefore was foreclosed from contesting its merits in the enforcement proceeding.

In *Milk Maid Dairy Products, Inc. v. Milk Control Commission*, 190 Pa. Super. 410, 154 A.2d 274 (1959), the court held that the rules of trade practices could not be attacked as illegal and invalid during a hearing suspending the milk dealer's license for violating the rules of trade practices since Milk Maid Dairy Products, Inc. did not contest the rules of trade practices in accordance with the procedure afforded by statute.

In *Commonwealth v. Hitzelberger*, 419 Pa. 354, 214 A.2d 223 (1965), and in *Commonwealth v. Atlantic and Gulf Coast Stevedores, Inc.*, 422 Pa. 442, 221 A.2d 128 (1966), it was held that the taxpayer defendants were unable to question the validity of the imposition of the taxes at a proceeding for col-

lection of the taxes for reason that they failed to pursue the statutory procedure provided for attacking the imposition of the tax.

In *St. Joe Minerals Corp. v. Goddard,* 14 Pa. Cmwlth. 624, 324 A.2d 800 (1974), the Commonwealth Court held that the statutorily provided right to appeal a DER order constituted an adequate remedy at law, precluding the collateral attack of DER regulations in equity.

In *School District of Borough of West Homestead v. Allegheny County Bd. of School Directors,* 440 Pa. 113, 269 A.2d 904 (1970), it was held that the Court of Common Pleas did not have jurisdiction to entertain an action in equity where an aggrieved school district had a right to appeal to the state board but did not do so.

In Accord: *Pittsburgh Coal Company v. School District of Forward Township,* 366 Pa. 489, 78 A.2d 253 (1951); *City of Philadelphia v. Sam Bobman Department Store,* 189 Pa. Super. 72, 149 A.2d 518 (1959); *Commonwealth v. Grier,* 215 Pa. Super. 66, 257 A.2d 317 (1969); and *Daniels v. Commonwealth,* 10 Pa. Cmwlth. 241, 309 A.2d 842 (1973).

Moreover, Pennsylvania law on the doctrine of exhaustion of administrative remedies is consistent with federal law. This fundamental principle has been applied by the federal courts in countless decisions. The following are only a few examples of the application of the doctrine by the federal courts. *United States v. Adams Wrecking Co.,* 545 F.2d 1 (6th Cir. 1976): The Court held that an order of

the Environmental Protection Agency, to which review could have been obtained under Section 307 of the Clean Air Act, is not subject to judicial review in civil or criminal proceedings for enforcement. *Whitney National Bank v. The Bank of New Orleans,* 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed. 2d 386 (1965): The Court held that a Federal Reserve Board determination could not be collaterally attacked in the District Court as Congress had provided an exclusive statutory procedure for review of Federal Reserve Board decisions. *Brennan v. Winters Battery Mfg. Co.,* 531 F.2d 317 (6th Cir. 1975): The Court held that an OSHA order became final and unreviewable on its merits because a notification of contest was not filed within fifteen (15) days from receipt and as a result the citation could not be contested in an enforcement action. *Sink v. Morton,* 529 F.2d 601 (4th Cir. 1975). The Court held that the enforcement of a deep mine closure order issued under the Federal Coal Mine Health & Safety Act of 1969 could not be enjoined as Plaintiff had not exhausted his administrative remedies by appeal of the order to the Secretary of the Interior. *Getty Oil Co. v. Ruckelshaus,* 467 F.2d 349 (3rd Cir. 1972): The Court held that when Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive.

B. The Doctrine of Exhaustion of Administrative Remedies As Applied in This Case Does Not Deprive Petitioner of Its Fourteenth Amendment Due Process Rights

Wheeling-Pittsburgh argues that it has been denied due process of law because it is precluded from attacking the validity of the DER order during an enforcement proceeding. However, Wheeling-Pittsburgh was given an opportunity to contest the validity of the order before it became final.[5] As Wheeling-Pittsburgh was advised of its rights to contest the order but chose not to exercise those rights, Wheeling-Pittsburgh's concern must be with the timing of judicial review, not the existence of judicial review. (See page 11, footnote 3 of Pa. Supreme Court opinion).

Due process does not require that a party shall have the right to interminably litigate the validity of an order (before, during and after its issuance); it only requires that there be an opportunity to contest the order. *Yakus v. United States,* 321 U.S. 414, 64 S.Ct. 660, 84 L.Ed. 834 (1944); *United States v. Ruzicka,* 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290 (1946), *Clarkson Construction Co. v. OSHRC,* 531 F.2d 451 (10th Cir. 1976); *McLean Trucking Co. v. OSHRC,* 503 F.2d 8 (4th Cir. 1974), and *Miller v. United States,* 242 F.2d 392 (6th Cir. 1957).

[5] The adequacy of the review procedure is not an issue in this case. Section 4 of the Pennsylvania Air Pollution Control Act, supra and Section 1921-A of the Administrative Code, supra, clearly provide for an appeal to the Environmental Hearing Board from departmental orders. The procedures for perfecting such an appeal are specified in 25 Pa. Code §21.1 et seq. and are governed by the Pa. Administrative Agency Law, the Act of June 4, 1945, P.L. 1388, as amended, 71 P.S. §1710.1 et seq. The Pa. Administrative Agency Law, supra, provides for a right of appeal from a decision of the Environmental Hearing Board to the Pa. Commonwealth Court.

This Court in *Yakus v. United States, supra,* held as constitutional the sections of the Emergency Price Control Act of 1942 which gave to the Emergency Court of Appeals exclusive jurisdiction to determine the validity of price regulations and orders of the administrator and foreclosed any further consideration of their validity as a defense to a prosecution for their violation. The Court stated that such an agreement presents no constitutional issue.

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil v. State of Vermont, 144 U.S. 323, 331, 12 S.Ct. 693, 696, 36 L.Ed. 450; Barbour v. State of Georgia, 249 U.S. 454, 460, 39 S.Ct. 316, 317, 63 L.Ed. 704; Whitney v. People of State of California, 274 U.S. 357, 360, 362, 380, 47 S.Ct. 641, 642, 643, 650, 71 L.Ed. 1095. . . While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis J. concurring in Whitney v. People of State of California, supra, 274 U.S. at page 380, 47 S.Ct. at page 650, 71 L.Ed. 1095, and it could hardly be maintained

that it is beyond legislative power to make the rule inflexible in all cases." *Yakus v. United States*, supra, 321 U.S. 414 at 444.

The two cases cited by Wheeling-Pittsburgh, *U.S. v. McCrillis*, 200 F.2d 884 (1st Cir. 1952), and *Smith v. U.S.*, 199 F.2d 377 (1st Cir. 1952), as support for its position, are based on the interpretation of the Housing and Rent Act of 1947. The Court in both cases held that Congress did not grant exclusive jurisdiction to one tribunal to determine the validity of the agency's actions, therefore, a party is not foreclosed from challenging the agency's action in an enforcement proceeding. There is an implicit recognition in both cases that Congress has the constitutional authority to grant exclusive jurisdiction to one tribunal.

Wheeling-Pittsburgh was not deprived of its Fourteenth Amendment rights to due process of law. The controlling fact is that Wheeling-Pittsburgh was granted a right to a hearing and a judicial determination but it chose not to exercise that right.

Since Rule 19 of the United States Supreme Court Rules states that a writ of certiorari will be granted only where there are special and important reasons therefore, and the Pennsylvania Supreme Court's decision merely reiterates the fundamental principle of exhaustion of administrative remedies, Petitioner's request for a writ of certiorari should be denied.

CONCLUSION

Respondent, DER, contends that Wheeling-Pittsburgh's petition for a writ of certiorari should be denied because (1) no federal question was raised by Wheeling-Pittsburgh during the proceeding before the Pennsylvania Supreme Court or the Pennsylvania Commonwealth Court, and (2) Wheeling-Pittsburgh raises no special or important reason for granting a writ of certiorari on a decision which merely addresses the state law on exhaustion of administrative remedies.

Respectfully submitted,

THOMAS M. BURKE,
Assistant Attorney General
Commonwealth of Pennsylvania, Department of Environmental Resources

CERTIFICATE OF SERVICE

I, Thomas M. Burke, in accordance with Rule 33 (1) of the Rules of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Pennsylvania on all parties required to be served by mailing three copies thereto to Paul A. Manion, Esquire, Reed, Smith, Shaw & McClay, 747 Union Trust Building, Pittsburgh, Pennsylvania 15230, Attorney for Petitioner, by first class mail, postage prepaid, this 4th day of November, 1977.

(s) THOMAS M. BURKE
THOMAS M. BURKE
Assistant Attorney General
Commonwealth of Pennsylvania, Department of Environmental Resources

APPENDIX A

IN THE
SUPREME COURT OF PENNSYLVANIA
Western District

No. 64 MARCH TERM, 1976

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

v.

WHEELING-PITTSBURGH STEEL CORPORATION, Appellant.

BRIEF FOR APPELLANT

WHEELING-PITTSBURGH STEEL CORPORATION

Appeal from an Order of the Commonwealth Court at No. 529 C.D. 1975.

PAUL A. MANION,
KERRY A. KEARNEY,
REED SMITH SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,
(412) 288-3236,
Counsel for Appellant,
Wheeling-Pittsburgh Steel Corporation.

Of Counsel:
GEORGE RAYNOVICH, JR.,
Wheeling-Pittsburgh Steel Corporation,
Four Gateway Center,
Pittsburgh, Pennsylvania 15222.

STATEMENT OF JURISDICTION

This is an appeal from an order of the Commonwealth Court which: (i) denied the defendant the right to introduce evidence relevant to its affirmative defense challenging the validity and enforceability of the administrative regulations upon which this action is based; (ii) denied the defendant a jury trial; and (iii) has been duly certified for appeal. This Court has jurisdiction of this appeal under Sections 203 and 501 of the Appellate Court Jurisdiction Act of July 31, 1970, P.L. 673, No. 223, Art. II, §203 and Art. V, §501, 17 P.S. §211.203 and §211.501(b).

STATEMENT OF QUESTIONS PRESENTED

I. Whether an order of the Commonwealth Court which: (i) denied defendant the right to introduce evidence relevant to an affirmative defense which, if permitted and proved, would establish an absolute defense to this action; (ii) denied defendant the right to a jury trial; and (iii) has been duly certified for appeal by the Commonwealth Court, is an appealable order? (Not answered by the Court below).

II. Whether the Commonwealth Court erred in ruling that defendant was precluded from introducing evidence relevant to the issues of the validity and enforceability of the DER regulations upon which this proceeding is based because defendant had not appealed an earlier order of the DER which had granted it a variance from those regulations? (Negatived by the Court below).

III. Whether the Commonwealth Court erred in denying defendant a jury trial in this action? (Negatived by the Court below).

HISTORY OF THE CASE

The Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), filed this action in the Commonwealth Court in the form of a "Petition for Enforcement of Administrative Order" under Section 10(a) of the Air Pollution Control Act,

as amended ("APCA") 35 P.S. §§4001-4015. In its petition the DER requested enforcement of its administrative order which had granted defendant Wheeling-Pittsburgh Steel Corporation ("W-P Steel") a variance from the rules and regulations of the DER concerning sinter plant emissions until April 30, 1973 (R. 2a-7a).

W-P Steel filed an answer to the DER's petition in which it challenged the validity and enforceability of the DER rules and regulations upon which the order was based. In its answer, W-P Steel also demanded a jury trial (R. 11a, 13a).

Thereafter, the court (Bowman, P. J.) ordered the parties to brief the questions (i) whether W-P Steel may challenge the validity and enforceability of the DER regulations and variance order in this proceeding and (ii) whether W-P Steel is entitled to a jury trial herein (R. 18a-19a).

Following the filing of briefs, the court handed down an opinion and order ruling that W-P Steel did not have the right to introduce evidence relevant to the issues of the validity of the DER's variance order or the regulations upon which it was predicated and that W-P Steel would be denied a jury trial in this action (R. 20a-28a). *DER v. Wheeling-Pittsburgh Steel Corporation,* 348 A.2d 765 (Cmwlth. Ct. December 10, 1975).

W-P Steel appealed that order to this Court (R. 29a). Simultaneous with that appeal, W-P Steel petitioned the Commonwealth Court to certify its appeal pursuant to Section 501(b) of the Appellate

Court Jurisdiction Act of 1970, 17 P.S. §211.501(b). As indicated in that petition, W-P Steel took the position that the Commonwealth Court's order was a "final" order for purposes of appeal under Pennsylvania law inasmuch as it foreclosed W-P Steel completely from introducing evidence on a vital affirmative defense to this action. W-P Steel stated in the petition that it was requesting certification of the questions involved in the Court's ruling in order to avoid any question concerning the appealability of that ruling (R. 30a-32a).

On January 7, 1976, Judge Bowman certified his order for appeal pursuant to Section 501(b) of the Appellate Court Jurisdiction Act of 1970 (R. 34a).

Thereafter, the DER filed a motion to quash this appeal (R. 35a-36a), to which W-P Steel filed an answer (R. 37a-39a). This Court has directed that the motion to quash the appeal will be heard at the argument on the merits (R. 40a).

SUMMARY OF ARGUMENT

I. Because the order which is the subject of this appeal (i) denied the defendant the right to introduce evidence on a vital affirmative defense which, if permitted and proved, would be an absolute defense to this action, and (ii) denied the defendant the right to a jury trial, it is a final order for purposes of appeal under this Court's decision in *Posternack v. American Casualty Co. of Reading,* 421 Pa. 21, 218

A.2d 350 (1966) and its progeny. Alternatively, this Court may hear this appeal because it has been duly certified for appeal under the Interlocutory Appeals Section of the Appellate Court Jurisdiction Act of 1970, 17 P.S. §211.501 (b).

II. The Commonwealth Court erred in law in ruling that defendant could not introduce evidence relevant to the issues of the validity and enforceability of the DER regulations which are the subject of this enforcement proceeding because defendant had not appealed an earlier variance order of the DER. Since defendant was not aggrieved by that earlier order, which granted it the very relief it had requested, it had neither the right nor the duty to appeal that order. This Court has ruled that a similar challenge to the enforceability of a DER order may be raised in a proceeding, like this one, brought to enforce such an order. *DER v. Pennsylvania Power Co.*, 337 A.2d 823 (1975). Moreover, a defendant in such a proceeding can always challenge the validity and enforceability of the regulation or order which is the subject of that proceeding unless there is a clear and specific legislative intent to the contrary. 3 K. Davis, *Administrative Law Treatise*, §23.07 at 320 (1958 ed.).

III. Defendant is entitled to a jury trial in this suit to enforce an order of the DER because it is a proceeding at law brought to enforce an alleged statutory duty and is analogous to common law actions of assumpsit and trespass in which a party has a constitutional right to a jury trial. In addition, defendant is

entitled to a jury trial on its request for a declaratory judgment that the DER regulations are invalid and unenforceable 12 P.S. §839 and §852.

ARGUMENT

I. The Order of the Commonwealth Court Is an Appealable Order

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A. The order is a final order for purposes of appeal.

As previously indicated, the order in question specifically directs that "respondent shall not have the right to introduce evidence relevant to the issues of the validity of the order in question or the DER regulations upon which it was predicated; and respondent is denied a jury trial in this proceeding." The order thus precludes W-P Steel from presenting evidence at trial relevant to an affirmative defense which, if permitted and proved, would be a complete defense to this action.

For these reasons, the order is clearly a "final" order for purposes of this appeal under this Court's ruling in *Posternack v. American Casualty Co. of Reading*, 421 Pa. 21, 218 A.2d 350 (1966). In that case, the trial Court had denied the defendant leave to amend its answer to assert an affirmative defense which, if successful, would have been a complete defense to the claim asserted in the complaint. In deny-

ing a motion to quash an appeal from that order, this Court ruled:

> "The order involved effectively precluded proof at trial of what might possibly be a complete defense to the cause sued upon. As to this defense, at least, the order appealed from puts the defendant 'out of court.' It is therefore, an appealable order" 218 A.2d at 351.

Accord:

Grota v. LaBoccetta, 425 Pa. 620, 230 A.2d 206 (1967) [Order denying leave to assert the affirmative defense of a release held a final order for purposes of appeal];

McCahill v. Roberts, 421 Pa. 233, 219 A.2d 306 (1966) [Order releasing real estate from plaintiff's claim but directing that proceeds should be held in escrow pending a further adjudication held a final order for purposes of appeal];

Goldman v. McShain, 432 Pa. 61, 247 A.2d 455 (1968) [Order holding that no enforceable contract had been pleaded and certifying case to law side of Court held a final order for purposes of appeal].

B. The order has been duly certified for appeal.

Even if the order were treated as an interlocutory order, it has been duly certified for appeal by the Commonwealth Court in accordance with Section 501-(b) of the Appellate Court Jurisdiction Act of 1970,

17 P.S. §211.501, as involving controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of this litigation. Accordingly, this Court may hear this appeal under Section 501 (b) in the event it should determine that the order is not a final order for purposes of appeal.

II. The Commonwealth Court Erred in Ruling That W-P Steel Is Precluded From Challenging the Validity of the DER'S Regulations in This Proceeding

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A. The Commonwealth Court's order is premised upon a fundamental misconception of the order which granted the variance.

The crux of Judge Bowman's ruling that W-P Steel is precluded from challenging the validity and enforceability of the DER's regulations concerning sinter plant emissions in this proceeding is that W-P Steel should have raised this issue in an appeal from the DER's grant of the variance which the Company had requested. W-P Steel respectfully submits that this ruling is based upon a fundamental misconception of the nature of the order which granted the variance. Since that order gave W-P Steel the identical variance which the Company itself had requested, W-P Steel was not "aggrieved" by the order, as required by 35 P.S. 4004 (4.1) in order to justify such an appeal.

Nor, contrary to the conclusion of Judge Bowman, was the Company "aggrieved" because the variance purported to require it to comply with the DER's regulations by April 30, 1973. For this provision of the variance imposed no greater obligation on W-P Steel following the expiration of the variance than had been imposed upon it by the regulations themselves before the variance was granted. Thus, although the DER denominated the grant of the variance as an "order," in legal effect the variance was the very opposite of a coercive abatement order issued under 35 P.S. §4004 (4.1). It is this intrinsic feature of the DER's variance order which makes inapposite the cases upon which Judge Bowman relied.

The Court first cited language from its opinion in *DER v. Pennsylvania Power Company,* 12 Pa. Cmwlth. Ct. 212, 316 A.2d 96 (1974), *aff'd,* 337 A.2d 823 (1975) which had criticized the respondent in that case for not appealing from abatement orders issued by the DER. But in that case the respondent chose not to appeal a coercive abatement order which had directed it to install certain pollution control devices and to submit timetables for compliance with the underlying regulations. As we have previously shown, the variance order in the instant case temporarily relieved W-P Steel of the burden of the DER's regulations and W-P Steel had no basis to appeal the order which granted the relief which it requested.

Actually, the decision of this Court in *Pennsylvania Power* supports W-P Steel's position in this case. For

there this Court permitted the respondent to raise a defense initially in an enforcement action notwithstanding that it had failed to appeal a mandatory injunction order of a Court of law—not merely, as here, an administrative order granting a temporary variance. 337 A.2d 823.

Penn Power involved an order of the Court of Common Pleas of Lawrence County which required the power company to submit a pollution control plan in compliance with newly promulgated particulate matter and sulfur dioxide emission standards. Penn Power did not appeal the order but submitted a timely application to DER setting forth a commitment to install what then appeared to be the "best available technology." The DER neither rejected nor accepted the application, but instead filed a petition for contempt with the Court of Common Pleas.

The Court of Common Pleas denied the contempt petition on the ground, *inter alia,* that it was impossible for Penn Power to comply with the Court's order. Rejecting DER's contention that the impossibility defense could not be raised for the first time in a hearing for contempt, the Commonwealth Court and this Court each unanimously affirmed.

This Court explained that the impossibility defense was not available to Penn Power during any prior hearing on the order. This Court also pointed out that Penn Power felt that its application for plan approval was valid, that it had been accepted by DER and had been incorporated into the order, and that, therefore, "even if legally able to petition or appeal

[the order], such actions could reasonably have appeared premature to" Penn Power. 337 A.2d at 831-32.

Similarly, W-P Steel believed it could comply with the DER's variance order of September 25, 1972. An attack upon the validity and enforceability of the regulations by W-P Steel at that time appeared premature to W-P Steel.

The other cases relied on in the opinion of the Commonwealth Court are distinguishable from this case. Four of those cases involved belated attempts to challenge the validity of action taken by an administrative agency at an earlier stage of the proceedings in the face of a failure by the respondent to follow specific statutory provisions which provided an unequivocal right of appeal from that determination.[1]

St. Joe Minerals Corp. v. Goddard, 14 Pa. Cmwlth. Ct. 624, 324 A.2d 800 (1974), held only that there was no jurisdiction in equity to consider a challenge to the validity of DER regulations because this challenge could be considered on appeal from the *denial* of the requested variance.

Standard Lime & Refractories Co. v. DER, 2 Pa. Cmwlth. Ct. 434, 279 A.2d 383 (1971) involved the

[1] *City of Philadelphia v. Sam Bobman Department Store Co.,* 189 Pa. Super. 72, 149 A.2d 518 (1959); *Commonwealth v. Lentz,* 353 Pa. 98, 44 A.2d 291 (1945); *Milk Maid Dairy Products, Inc. v. Milk Control Commission,* 190 Pa. Super. 410, 154 A.2d 274 (1959); *Erie Human Relations Commission v. Erie Insurance Exchange,* 12 Pa. Cmwlth. Ct. 267, 315 A.2d 663 (1974), *aff'd,* 348 A.2d 742 (1975).

question whether a letter from the predecessor to the DER to the appellant, which denied it a hearing on a proposed timetable of compliance with respect to a previously issued abatement order, could form the basis for an appeal to the Commonwealth Court. The Court held that it could not. In *dicta* the Court commented that the appellant could not thereafter question the original *abatement order.*

W-P Steel submits that none of these cases rules this case since W-P Steel had no prior opportunity to challenge the DER regulations involved in this proceeding.

B. A defendant can challenge the validity of an administrative order or regulation in an enforcement proceeding unless there is a clear legislative intent to the contrary.

Even if W-P Steel could have challenged the DER regulations on appeal from the grant of the variance which it requested, it would not be foreclosed from making such a challenge in this enforcement action. The weight of authority is that a defendant in a proceeding to enforce an administrative order or regulation can challenge its validity in that proceeding unless the statute in question manifests a clear legislative intent to the contrary. As the recognized expert on administrative law, Professor Kenneth Culp Davis, states in his treatise on this subject:

> "In general, a defendant in a civil or criminal proceeding brought to enforce an administrative order or regulation may defend*ant* on the ground of invalidity of the order or regulation, in absence

> of affirmative legislative intent to the contrary. The natural assumption is that one may not be held civilly or criminally liable for violating an invalid order or regulation. The tradition is deeply embedded that even statutes may be challenged by resisting enforcement."[2]

See also, L. Jaffe, *Judicial Control of Administrative Action,* at 426 (1965 ed.).

The statutes applicable to the within action clearly do not prohibit W-P Steel from asserting a defense based upon the invalidity of the DER order and regulations. Section 4(4.1) of the APCA, 35 P.S. §4004 (4.1), states that a person to whom an order is issued by the DER or any other aggrieved by such order *may* file an appeal with the Environmental Hearing Board ("EHB"). That section further provides that any person aggrieved by an adjudication of the EHB *may* appeal to the Commonwealth Court. The language of the statute is clearly discretionary. There is no language which sets up a mandatory administrative or judicial review procedure which, if bypassed, would eliminate any further consideration of the validity of the order or regulations by the judiciary. Moreover, there is no intent to exclude the issue of validity in the enforcement stage of proceedings.[3]

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[2] 3 K. Davis, *Administrative Law Treatise,* §23.07 at 320 (1958 ed.).

[3] Compare this section of the APCA with §307(b)(1) of the federal Clean Air Act, 42 U.S.C. §1857h 5(b)(1), wherein Congress provided for review of certain actions of the Administrator of the Environmental Protection Agency *only* in the United States Court of Appeals for the District of Columbia *and* for review of certain other actions *only* in the United States Court of Appeals for the appropriate circuit. Moreover, in §(b)(2), Congress specifically stated that action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. There is no such provision in any Pennsylvania statute relevant to the instant action.

Further, a statute should not be read to include such a provision. Professor Jaffe explains:

> ". . . When a statute is read to exclude judicial consideration of validity, by any other than the statutory court, it is likely to have the consequence that the administrative procedure is an absolute requisite of review since it is only orders resulting from such procedure which are stated to be subject to the jurisdiction of any Court. *But a statute should not if possible be read so* (emphasis in original). *A Court should not lightly entertain the presumption that a statute means to embody a rule of exhaustion which excludes the application of traditional equitable considerations"* (emphasis added). L. Jaffe, Judicial Control of Administrative Action 426 (1965 ed.).

Similarly, Section 41 of the Administrative Agency Law ("AAL"), 71 P.S. §1710.41, provides that any person aggrieved by an adjudication of an administrative agency shall have the *right* to appeal therefrom. There is nothing in that section which renders an agency's determination final and binding in the absence of an appeal, or which precludes a challenge to the validity of an administrative order or regulation in an enforcement proceeding.

Although there is a dearth of authority on this question in Pennsylvania,[4] the precedent in other jurisdictions supports W-P Steel's contention in this case.

For example, in *United States v. McCrillis,* 200 F.2d 884 (1st Cir. 1952), the government brought an action to recover statutory damages for rental overcharges and to obtain an injunction and an order of restitution under the Housing and Rent Act of 1947, as amended. The government contended that a landlord defending an enforcement suit had no standing to challenge in the district court the validity of the regulation or order claimed by the government to have established the lawful maximum rent, where the landlord had failed to invoke the available administrative procedure whereby he might have had the regulation or order set aside by administrative action. The Court of Appeals held that the landlord could raise the issues of invalidity, explaining:

> "In the absence of any statutory provision on the subject, we stated in *Smith v. United States, supra* [199 F.2d 382] that we were not aware 'of any general judge-made doctrine that a defendant in an enforcement suit, charged with having violated an administrative regulation or order, is precluded from setting up the defense that the regulation or order is invalid, merely because the defendant had failed to make use of an available administrative procedure by which he might have obtained administrative action to set aside the regulation or order' " 200 F.2d at 886.

[4] But see this Court's opinion in *Pennsylvania Power Co., supra.*

The *Smith* case cited in *McCrillis* was an action brought by a tenant against his landlord under the Housing and Rent Act of 1947 for restitution of alleged rent overcharges and for a permanent injunction against further violations of the Act and the regulations thereunder. The First Circuit Court of Appeals pointed out that neither the Housing and Rent Act nor the regulations issued pursuant thereto precluded a defendant charged in an enforcement suit from setting up the defense of invalidity of the regulation merely because he had failed to make use of available administrative procedures to set it aside. In view of the absence of such statutory provisions or similar judge-made doctrine, the court held that the district Court had jurisdiction to adjudicate the defense of invalidity. *Smith v. United States,* 199 F.2d 377 (1st Cir. 1952).

Similarly, in *County of Lake v. MacNeal,* 24 Ill. 2d 253, 181 N.E. 2d 85 (1962), the Supreme Court of Illinois held that a defendant in an action instituted by the county government could raise any defense which exonerates him from liability. That case involved an action by a local government to enjoin property owners from violating a county zoning ordinance. The defendants pleaded that the Zoning was unconstitutional and void. The government contended that the validity of the ordinance could not be challenged in the injunction action because the defendants had not exhausted their administrative remedies to secure relief from the enforcement of the ordinance.

The Illinois Supreme Court followed "the sound principle, based upon the assumption that one may not be held civilly or criminally liable for violating an in-

valid ordinance" and held that a proceeding for the violation of a municipal regulation is subject to any defense which will exonerate the defendant from liability, including the defense of the invalidity of the ordinance: The court further explained (181 N.E. 2d at 90):

> "... So long as local authorities institute an action, a defendant should be entitled to defend on the ground of the invalidity of the ordinance and to have the issue determined. If it were to be otherwise, the result could be that judicial machinery would be used to enforce an ordinance that is unconstitutional."

It follows from these authorities and from this Court's decision in *Penn Power* that a party may question the validity of an order or regulation in a compliance proceeding.

As discussed above, *Penn Power* held that the defense of impossibility of performance can be raised in an enforcement proceeding initiated by DER even though the issue had not previously been raised. The defense of impossibility is inextricably linked to the validity of the order and the regulations upon which the order is based since an order or regulation which compels the impossible is, *a fortiori,* unreasonable and invalid.

More importantly, *Penn Power* held that a party may not be held in contempt for failure to comply with an order which compels the impossible. In other words, an order which compels the impossible is unenforceable under *Penn Power*. It necessarily follows

that an order which is unenforceable is invalid and void.

Additionally, public policy considerations militate in favor of W-P Steel being permitted to challenge the validity of the DER's regulations in the instant proceeding. Allowing the challenge at this time encourages parties to seek compliance with agency orders at the time of issuance rather than to appeal automatically all such orders in order to preserve issues for later proceedings. On the other hand, if W-P Steel is denied the opportunity to raise the issue of invalidity at this time, this Court will be encouraging piecemeal appeals of all agency orders while at the same time discouraging parties from good faith attempts to comply with agency orders.

Finally, any reliance by the DER upon the Act of March 21, 1806, P.L. 558, 46 P.S. §156, which requires strict pursuit of statutory remedies, is misplaced. As this Court has held, a necessary prerequisite to the applicability of that Act is that the statutory remedy must be *exclusive. School District of the Borough of West Homestead v. Allegheny County Board of School Directors,* 440 Pa. 113, at 118-119, 269 A.2d 904 (1970). As we have earlier pointed out, neither the APCA nor the AAL provides an exclusive statutory remedy for challenging the validity of the DER regulations. Moreover, here W-P Steel had no basis for appealing the order which granted it the identical variance which it had requested.

III. W-P Steel Has a Constitutional Right to a Jury Trial in This Action

A. W-P Steel is entitled to a jury trial on the DER's petition for enforcement of its order.

In its answer to the DER's petition for enforcement of its order, W-P Steel has demanded a jury trial of the issues raised in this action. The basis for that demand may be found in Article I, Section 6 of the Constitution of Pennsylvania, which provides as follows:

> "Trial by jury shall be as heretofore, and the right thereof remains inviolate."

There is, of course, a strong tradition in Pennsylvania in favor of the right to trial by jury, *William Goldman Theatres, Inc. v. Dana,* 405 Pa. 83, 93, 173 A.2d 59, 64, *cert. denied,* 368 U.S. 897 (1961); *Commonwealth v. Fugmann,* 330 Pa. 4, 29, 198 Atl. 99, 111 (1938); *Commonwealth v. Dillworth,* 431 Pa. 479, 486, 246 A.2d 859, 862 (1968).

In order to determine whether the constitutional right to a jury trial is applicable to the instant proceeding, one must first analyze the nature of this suit to determine whether it is in the nature of an action at law or a suit in equity. The starting point is the statute which authorizes the DER to petition the court for enforcement of its order, Section 10(a) of the APCA, 35 P.S. §4010(a). Although that Section is silent on the right to a jury trial, it is clear that proceedings under it are at law rather than in equity. For under traditional principles of Pennsylvania law, a statutory remedy gives rise to an action at law rather than in equity: *Pennsylvania Life Insurance Co. v. Pennsylvania National Life Ins. Co.,* 417 Pa. 168, 208 A.2d 780 (1965); *Commonwealth v. Glen Alden Corp.,* 418 Pa. 57, 210 A.2d 256 (1965); *Gordon v. Biesinger,* 335 Pa. 1, 6 A.2d 425 (1939).

Section 10(a) provides a specific statutory remedy at law: a petition to enforce an administrative order. It stands in marked contrast to the other subsections in Section 10: Section 10(b) authorizes the institution of an action in equity for an injunction to restrain violations of the Act or the rules and regulations promulgated thereunder; Section 10(c) provides for an action in mandamus; Section 10(d), like Section 10(b), authorizes equitable actions for injunctions; and Section 10(f) authorizes suits to abate nuisances or to restrain violations at law or in equity.

Next, it must be determined whether this is the type of action at law in which there was a right to a jury trial at common law. Because a petition to enforce an administrative order was unknown at common law, the question is whether this statutory remedy is analogous to any common law remedy in which there was a right to a jury trial. *Byers and Davis v. Commonwealth,* 42 Pa. 89 (1862); *Rhines v. Clark,* 51 Pa. 96 (1863). In making this analysis, the paramount Pennsylvania policy in favor of trial by jury must be borne in mind.[5]

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[5] The Commonwealth Court ruled that because this proceeding is "wholly a creature of recent statutory law," 348 A.2d at 768, there is no right to a jury trial. That conclu-

Insofar as the DER seeks to enforce an outstanding administrative order in this action, this suit involves an action in assumpsit on a judgment or order:

> "At common law the proper form of action on a judgment, irrespective of the nature of the original cause of action, was debt, and not assumpsit. In Pennsylvania, since all demands formerly recoverable in debt must be enforced and recovered in an action of assumpsit, the form of action on a judgment is assumpsit, ...
>
> "The Rules of Civil Procedure recognize that an action of assumpsit may be maintained on a judgment, order, or decision of a domestic or foreign Court, judicial or administrative tribunal or board, commission, or officer, in Rule 1019(e), setting forth the necessary contents of pleadings." 1 *Standard Pennsylvania Practice* Ch. 3 §22 at 462-63 (Footnotes omitted).

Of course, it is well established that there is a right to a jury trial in an action of assumpsit. 50 C.J.S., Juries, §16 at 731; 47 Am. Jur. 2d, Jury, §39 at 657-58. *See also,* 5 J. Moore, *Federal Practice,* ¶38.11[5] at 118-120.

Insofar as the DER seeks in this action to enforce a right of action arising out of an alleged failure of W-P Steel to perform a statutory duty, this suit is in the nature of an action in trespass:

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sion does not follow from the premise. Where, as here, the statute is silent on the right to a jury trial, it must be determined whether the statutory remedy is analogous to a common law remedy in which there was a right to a jury trial.

> "Trespass is generally the proper form of action to enforce a right of action arising out of a failure to perform a statutory duty. It is the proper remedy to enforce a right of action against a constable for his refusal to assist in making an appraisement and sale of chattels distrained for rent, and to enforce a claim for double the value of goods taken on a wrongful distress." 1 *Standard Pennsylvania Practice* Ch. 3 §44 at 486 (footnotes omitted).

And it is clear beyond peradventure that an action in trespass in Pennsylvania gives raise to a right to trial by jury. As Professor Amram has observed, "The actions of trespass, trover and trespass on the case, which are now consolidated into the action of trespass, have always been subject to jury trial." 1 Goodrich-Amram, *Standard Pennsylvania Practice,* §1048-1, at 304.

Thus, defendant is entitled as a matter of legal right to a jury trial on the DER's petition to enforce its administrative order in the Commonwealth Court.[6]

B. W-P Steel is entitled to a jury trial on its request for declaratory relief in its answer.

In the prayer for relief in its answer to the DER's petition, W-P Steel has requested the Court to enter a declaratory judgment that the order and regulations in

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[6] It should be noted that the Pennsylvania Rules of Civil Procedure specifically contemplate the trial of jury actions in the Commonwealth Court. Pa. R.C.P. 215.1.

question are invalid and unenforceable (R. 12a). Consistent with its First Defense of impossibility of performance, W-P Steel also requested the Court to enter a declaratory judgment that the order is unenforceable on that ground as well.

Under the Pennsylvania Declaratory Judgment Act, Act of June 18, 1923, P.L. 840, as amended, 12 P.S. §§831-853, W-P Steel has a legal right to a jury trial on the issues of fact raised by its request for declaratory relief. The provisions of the Act granting W-P Steel that right are Section 9 of the original Act, 12 P.S. §839, and Section 6 of the Supplemental Act of May 22, 1935, P.L. 228, 12 P.S. §852. These sections provide as follows:

> "§839. *Jury Trial*
>
> "When a proceeding under this act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending."
>
> * * *
>
> "852. *Jury Trial*
>
> "If the petitioner or a defendant desires any issue of fact to be tried and determined by a jury, he shall so demand in his petition or answer, and if no such demand is made, its absence shall be treated as equivalent to an agreement to dispense with trial by jury, and that all issues of fact, as well as those of law, may be determined and found by the court, subject to exceptions and appeal, as in equity cases."

These sections make it clear that the parties to a declaratory judgment action in Pennsylvania have a statutory right to a jury trial in that action unless they fail to make a timely demand therefor. And the reported cases under Section 6 of the Supplemental Act which have denied that right have done so solely on the basis of the failure to make a timely demand therefor or because of an agreement to dispense with trial by jury: *Guerra v. Galatic,* 185 Pa. Super. 385, 137 A.2d 866 (1958); *Melnick v. Melnick,* 154 Pa. Super. 481, 36 A.2d 235 (1944); *Stone v. Fenstermacher,* 74 D&C 440 (1950); *McCandless v. Burns,* 377 Pa. 18, 104 A.2d 123 (1954).

Of course, issues of fact requiring resolution by a jury lie at the heart of defendant's request for declaratory relief in this action. Indeed, it would be difficult to imagine a case in which factual issues could be more predominant. For example, defendants request a declaratory judgment that the DER's rules and regulations are invalid and unenforceable because (a) they are unnecessarily stringent for the protection of the public health, safety or welfare; (b) they attempt to impose standards which are unreasonable and impossible of attainment with available technology; (c) they are arbitrary and capricious in the light of available technology; and (d) they are incapable of rational enforcement and are void for vagueness. It is readily apparent that these claims are replete with issues of fact, as is defendants' claim that the DER order is unenforceable because it is impossible to comply with it.

Nor can defendant's right to a jury trial on its request for declaratory relief be denied merely because it was asserted in answer to the DER's petition for enforcement. Section 7 of the Supplementary Act specifically provides that the procedural context in which the request is made does not affect the right to relief:

> "§853. *Power of the court to enter judgment decree.*
>
> "Nothing in this act shall prevent a court from entering a declaratory judgment or decree in any civil proceeding, suit, or action no matter how commenced, where all parties, to be affected, are actually in court or have had such notice of the proceeding, suit, or action as it required by law, and where the court is convinced, that such a judgment or decree is appropriate and proper to be entered."

Finally, the Court's limited discretion to deny the requested relief under Section 6 of the original Act, 12 P.S. §836, which has been severely curtailed by recent decisions of this Court,[7] clearly does not and cannot affect defendants' statutory right to a jury trial of the factual issues involved in defendant's request. The Commonwealth Court's ruling to the contrary is clearly erroneous. That ruling was based on the language in Section 6 providing that "where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy must be followed." But as

[7] *Friestad v. Travelers Indemnity Co.*, 452 Pa. 417, 306 A.2d 295 (1973); *Liberty Mutual Ins. Co. v. S.G.S. Co.*, 456 Pa. 94, 318 A.2d 906 (1974).

we have already demonstrated, pp. 12-14, neither the APCA nor the AAI provides a special form of remedy to respondent in this case.

More importantly, the Court neglected to quote the following qualifying clause in Section 6, which provides:

> ". . . but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, or an equitable remedy, or an extraordinary legal remedy, *whether such remedy is recognized or regulated by statute or not,* shall not debar a party from the privilege of obtaining a declaratory judgment or decree in any case where the other essentials to such relief are present . . ." (emphasis supplied). 12 P.S. §836.

In this case a mere appeal through the administrative process would not have resulted in the kind of relief which W-P Steel requests the court to grant it in this action, *i.e.*, not merely an order dismissing the DER's petition to enforce but a declaratory judgment that the order and the regulations upon which it is based are invalid and unenforceable. Without such declaratory relief, the DER would be free to institute another proceeding to enforce its rules and regulations at some later date. Thus, it is essential to W-P Steel that it receive the declaratory relief which it has requested in this action.

As support for its decision, the court cited *Gold v. Department of Public Instruction,* 16 Pa. Cmwlth. Ct. 237, 328 A.2d 559 (1974). But the clearly stated

basis for the decision in *Gold* was that there was an alternative, exclusive statutory remedy available to the party who had sought a declaratory judgment in that case. As we have already demonstrated, there is no such exclusive statutory remedy in this case and, in any event, no such statutory remedy could provide W-P Steel with what it requests in this action, *i.e.*, a declaratory judgment that the DER's order and regulations are invalid and unenforceable. Only if it is granted such declaratory relief will W-P Steel be safeguarded against further prosecution by the DER.

Conclusion

For the foregoing reasons, defendant respectfully submits that the order of the Commonwealth Court should be reversed with directions: (i) to permit defendant to engage in discovery and to introduce evidence at trial relevant to the validity and enforceability of the DER regulations and (ii) to grant defendant a jury trial in this action.

Respectfully submitted,

PAUL A. MANION,
KERRY A. KEARNEY,
REED SMITH SHAW & MCCLAY,
Counsel for Appellant,
Wheeling-Pittsburgh Steel Corporation
747 Union Trust Building
Pittsburgh, Pennsylvania 15219,
(412) 288-3236.

Of Counsel:
GEORGE RAYNOVICH, JR.
Wheeling-Pittsburgh Steel Corporation,
Four Gateway Center,
Pittsburgh, Pennsylvania 15222.